BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SUSAN L. THOMPSON	)	
Claimant	)	
	)	
VS.	)	
	)	
RENZENBERGER, INC.	)	
Respondent	)	Docket No. 1,025,518
	)	
AND	)	
	)	
CONTINENTAL CASUALTY CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the May 11, 2007 preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein.

ISSUES

Claimant sustained a compensable accident on December 8, 2003 which caused rather devastating physical injuries, including permanent paraplegia from the mid-back area on down. Once claimant's condition stabilized, she was transferred to a nursing home as she is presently unable to live at home because her care requires special equipment. Before her accident claimant was a large woman and even with some weight loss immediately after her accident, claimant remains obese. And now her paraplegia, her weight and attendant health issues require her to remain in a nursing home.

Claimant now seeks additional medical treatment, internet services as well as the payment of outstanding medical bills incurred as the result of a fall from her wheelchair. Claimant also seeks an order directing respondent to provide copies of the records generated by the nurse case manager. Following the preliminary hearing, the ALJ granted each of claimant's requests. And respondent's appeal followed thereafter.

The respondent requests review of each aspect of the ALJ's Order and highly summarized, contends the ALJ exceeded his jurisdiction in authorizing the sought-after

treatment, service or disclosure of the records and/or erroneously concluded claimant's subsequent injury on February 17, 2007 is causally connected to the underlying compensable accident.

Claimant argues that the Board has no jurisdiction for any of the disputed issues but one - that being the compensability of the February 17, 2007 fall from a wheelchair. And on that issue claimant contends the ALJ's Order should be affirmed as that fall was the result of her paraplegia and her need for a wheelchair.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant was involved in a seriously debilitating motor vehicle accident in 2003 which left her a paraplegic, losing all voluntary movement from the mid-back on down. There is no present dispute as to the compensability of this accident, nor of the fact that respondent has paid over $1,000,000 in medical costs associated with this injury. Claimant is confined to a nursing home because she requires special assistive devices in order to transfer from bed to wheelchair, and requires assistance to care for her personal needs. She cannot travel in a car and instead, requires an ambulance or specially modified van. The need for nursing home care and ambulatory assistance is due, in part, to the fact that claimant presently weighs 270 pounds and is unable to tend to or care for herself.

It is uncontroverted that claimant was a large woman before her work-related accident. And since her accident, she has, in spite of her own efforts, been unable to lose weight. It is also uncontested that the treating physician, Dr. Jeff Halford, has recommended that claimant lose weight as a means of increasing her independence and returning home. To that end, he has referred her to a surgeon for the purpose of considering bariatric surgery as a means of losing weight. Respondent has refused to honor this recommendation as it maintains that "[c]laimant has not met her burden in proving that her obesity or failure to lose weight has been caused by her alleged work-related accident."[1] Accordingly, respondent contends the ALJ exceeded his jurisdiction in ordering it to provide this evaluation and potentially the surgery, if recommended.

Dr. Halford also referred claimant to Dr. Dohne, for psychiatric treatment of her depression. Dr. Dohne, suggested that claimant's psychiatric condition would likely improve if she were to increase her communication with the outside world, thus decreasing her isolation. As a means of facilitating that process of communication, Dr. Dohne has recommended that claimant obtain an internet connection so that she may use her computer while she remains in the nursing home. And claimant has testified that this form

[1] Respondent's Brief at 6 (filed June 12, 2007).

of communication helps her deal with the myriad of issues associated with her condition. Respondent has refused this request as it argues that providing internet service is not considered "medical treatment" as that term is used under the Workers Compensation Act.[2] And like the previous issue, respondent maintains the ALJ exceeded his jurisdiction in ordering that such service be provided.

Also at issue at the preliminary hearing was the matter of medical bills incurred in connection with a February 17, 2007 accident. Claimant was riding in an EMS vehicle on her way to a family gathering when she unexpectedly fell from her wheelchair and broke her left leg. There is no doubt that claimant hid the facts and circumstances surrounding this recent accident as she did not want the driver of the vehicle, who was providing the transportation as a favor, to be implicated.

Respondent contends this subsequent accident was not a natural and probable consequence of her original work injury. Rather, it was a distinct and unrelated event that respondent is not responsible for, particularly given claimant's less than candid disclosure of the events surrounding the accident. Conversely, claimant asserts that because her work-related accident placed her in the wheelchair, her subsequent fall from that wheelchair is a natural and probable consequence of her original accident, because being in a wheelchair instead of a car seat placed her at a greater risk of injury and because her bones are now brittle from inactivity resulting from her paraplegia.

Finally, the parties are locked in a dispute stemming from the discoverability of the nurse/case manager's notes and reports to the insurance carrier. Respondent maintains these are not records that are discoverable under K.S.A. 44-550 or K.S.A. 44-550b and that the ALJ exceeded his jurisdiction in ordering them to be produced.[3] And claimant maintains the records are properly discoverable under K.S.A. 44-551(b)(1) and K.S.A. 60-234.

I. Jurisdiction

Before addressing the substantive issues, consideration must be given to whether there is jurisdiction for the issues brought before the Board. K.S.A. 44-534a limits the Board's jurisdiction to consider appeals from preliminary hearing orders to the following issues:

(1) Whether the employee suffered an accidental injury;

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[2] At one point the respondent had inadvertently been facilitating internet service via a dial up telephone line in claimant's room at the nursing home. But once respondent learned it was paying for a telephone line, respondent refused to pay for the line and it was disconnected.

[3] Respondent's Brief at 14 (filed June 12, 2007).

(2) Whether the injury arose out of and in the course of the employee's employment;

(3) Whether notice is given or claim timely made;

(4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.[4]

Here, there is a single issue that is presumptively appropriate for an appeal to the Board, that being the compensability of claimant's subsequent February 17, 2007 accident and resulting injury and attendant medical bills. Whether that accident is the natural and probable result of the underlying accident and thus considered to have arose out of and in the course of claimant's employment is appropriate for review at this juncture of the claim.

Although the issue of the surgical consultation is, on its face, not a presumptively jurisdictional issue, this Board Member finds that the issue is inherently related to the question of whether claimant's need for the recommended treatment is causally related to the underlying accident. And that issue is jurisdictionally appropriate when appealed to the Board from a Preliminary Hearing. Accordingly, this Board Member will consider whether claimant's present need for a surgical consultation with the bariatric surgeon is a need that arises out of and in the course of her work-related accident.

As for the remaining issues which are not presumptively jurisdictional, respondent has alleged the ALJ exceeded his authority in ordering respondent to provide internet services and produce records generated by the nurse/case manager. Thus, this Board Member will individually consider whether there is jurisdiction for each issue based upon that assertion.

II. Compensability of February 17, 2007 Accident

The ALJ concluded that claimant's accident on February 17, 2007 in the EMS vehicle while on a trip to a family function was a natural and probable consequence of the original work injury. He indicated that "[t]he matter is no different that [sic] a knee injury

[4] See K.S.A. 44-551.

causing a fall that results in a broken arm. But for the work injury [c]laimant's fall would not have occurred."[5] This Board Member disagrees with this analysis.

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*[6], the Court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1).

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*[7], the Court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*[8], the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*[9], the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never

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[5] ALJ Order (May 11, 2007) at 2.

[6] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[7] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[8] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[9] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."

The present situation admittedly presents a close call. While it is true that claimant would not have been in a wheelchair but for her work-related accident, it is nevertheless true that claimant was not impervious to injury before her 2003 disabling vehicular accident. She could have fallen victim to another person's negligence and broken her leg. There is evidence in the record that suggests that claimant's paraplegia weakens her bones and as a result, she is at risk for broken bones, which is just what happened when she fell from her wheelchair.

While it is true that had claimant been on her way to receive medical treatment[10] her injuries would have been compensable, here claimant was on her way to a family function. And not everything that happens to claimant which causes her injury constitutes a compensable event. In this instance, this Board Member finds that claimant's broken leg, which was from all indications as a result of another's negligence, constitutes a new and distinct accidental injury. Admittedly, this is a close call. Nonetheless, based upon this record this Board Member is unable to conclude that claimant's broken leg would not have happened in the absence of her original accident and resulting paraplegia. Accordingly, the ALJ's Order directing respondent to pay the medical bills associated with the February 17, 2006 accident is reversed.

III. Surgical Consultation

Respondent adamantly refuses to provide the surgical consultation that its own authorized doctor has recommended as it maintains "[c]laimant has not met her burden in proving that her obesity or failure to lose weight has been caused by her alleged work-related accident."[11] The fallacy in this argument is that claimant does not have to prove that her obesity *has been caused by her work-related accident.* Rather, she only needs to establish that her need for treatment is reasonably necessary to cure and relieve the effects of her injury.[12]

The uncontroverted medical evidence makes it clear that weight reduction is the sole path to claimant's increased independence, independence that was lost when she became a paraplegic following her accident. And with independence comes the possibility that claimant will no longer need to reside in a nursing home, a placement that respondent

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[10] *Roberts v. Krupka*, 246 Kan. 433, 790 P.2d 422 (1990).

[11] Respondent's Brief at 6 (filed June 12, 2007).

[12] K.S.A. 44-510h.

clearly finds financially repugnant. This Board Member finds that claimant's present need for the consultation with a bariatric surgeon is reasonably necessary and is causally connected to her accident. The fact that claimant was obese before her accident is no bar to the treatment she now seeks. That portion of the ALJ's Order is affirmed.

III. Internet Service

The issue of the internet service is one of first impression. K.S.A. 1996 Supp. 44-510(a) states in pertinent part:

> It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus, and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director in the director's discretion so orders, . . . as may be reasonably necessary to cure and relieve the employee from the effects of the injury.[13]

K.S.A. 1996 Supp. 44-510(a), as noted above, requires that employers provide such medical treatment as is "reasonably necessary to cure and relieve the employee from the effects of the injury." The case law interpreting this language has consistently found that the statute contemplates the employer being responsible for all treatment which relieves the employee's symptoms, arising from the injury.[14]

The difficulty here is that an internet connection is not, in this Board Member's view, medical treatment. Claimant does not require this to facilitate her treatment in any way. The uncontroverted medical testimony (as well as claimant's own opinion) is that it may well alleviate her isolation and depression which is directly relatable to her accident and help her find calorie counting devices, but a close reading of the statute reveals no interpretation by which an internet connection could be construed as medical treatment. Moreover, it is this Member's view that simply because a physician has indicated that a service or device might prove helpful, that fact alone does not transform that service or device into "medical treatment".

> When a statute is plain and unambiguous, a court must give effect to its express language, rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not

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[13] The quoted language was inserted in K.S.A. 44-510h when K.S.A. 44-510 was repealed by the 2000 Legislature.

[14] *See Carr v. Unit No. 8169,* 237 Kan. 660, 703 P.2d 751 (1985); *Horn v. Elm Branch Coal Co.*, 141 Kan. 518, 41 P.2d 751 (1935).

> readily found in it. If the statute's language is clear, there is no need to resort to statutory construction.[15]

To be clear, this Board Member finds the internet connection is reasonable, if not a compassionate gesture under these facts and circumstances were it to be provided. But it is not, under the statute, considered medical treatment and thus, this Board Member finds the ALJ exceeded his jurisdiction in ordering respondent to provide this service and that portion of the Order is reversed and set aside.

IV. Nurse/Case Manager's Records

While respondent contends K.S.A. 44-550 and K.S.A. 44-550b limit discovery of the sought-after documents, this Board Member finds that these statutes are irrelevant to the pending dispute. Those statutes speak to the records to be maintained by the Director of the Division of Workers Compensation and whether and under what circumstances those records can be provided. Here, the issue is what documents respondent (and its carrier) have in their possession can be discovered.

Although the Workers Compensation Act does not contain formal rules of discovery, K.S.A. 44-549 (Furse 2000) provides that the Director and, by implication, the administrative law judges, have the power to compel "the production of books, accounts, papers, documents, and records to the same extent as is conferred on district courts of this state under the code of civil procedure."[16]

Generally, parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues.[17] The frequency or extent of discovery should be limited only if (1) the discovery sought is unreasonably cumulative or duplicative, or obtainable from some other source that is more convenient, less expensive, or less burdensome; (2) the party seeking discovery has had ample opportunity to obtain the information sought; or (3) the burden or expense of the discovery outweighs its likely benefit, considering the amount in controversy, the needs of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues.[18]

Revelation through discovery procedures of the strength and weaknesses of each side before trial encourages settlement of cases and avoids costly litigation. Each side can

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[15] *Graham vs. Dokter Trucking Group*, Docket No. 95,650 (Kansas Supreme Court opinion filed July 13, 2007).

[16] See also K.S.A. 44-551(b)(1).

[17] See K.S.A. 2003 Supp. 60-226(b)(1).

[18] See K.S.A. 2003 Supp. 60-226(b)(2).

make an intelligent evaluation of the entire case and may better anticipate the ultimate results.[19]

Moreover, K.A.R. 51-3-8 provides that "the parties shall exchange medical information and confer as to what issues can be stipulated to and what issues are to be in dispute in the case" prior to the first hearing. Also, see K.A.R. 51-9-10 which contains certain production requirements directed to health care providers and K.S.A. 44-5,120 (Furse 2000) which makes concealing a material fact a fraudulent and abusive act. Clearly, the Act envisions the open sharing of information in order to facilitate resolution of the claim with the minimum litigation possible.

Respondent does not assert any sort of privilege in these documents only that the ALJ exceeded his authority in ordering them to be produced based upon a statute that this Board Member finds wholly irrelevant. Even a cursory reading of K.S.A. 60-226 makes it clear that the records generated by the Nurse/Case Manager are very relevant to this matter. They are, in reality, no different than the notes a nurse takes in preparation for a physician to evaluate or treat a patient, which are, in workers compensation, fully discoverable. The only apparent difference here is the fact that this case manager tenders them to the insurance carrier rather than placing them in a medical file. And that difference carries no meaning in this context.

More to the point, respondent has made these records and reports particularly relevant given their obvious intent to point out claimant's less than successful attempts at losing weight and her veracity in connection with her subsequent injury in February of 2007 and bolster the nurse's testimony on this issue. It would seem that respondent wants to use the sought-after records offensively but then turns around and has refused full disclosure.[20] Accordingly, this Board Member finds the ALJ did not exceed his jurisdiction in ordering the production of the Nurse/Case Manager's reports and/or notes. That portion of respondent's appeal is, therefore, dismissed for lack of jurisdiction.[21]

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[22] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

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[19] *Hawkins v. Dennis*, 258 Kan. 329, 341, 905 P.2d 678 (1995).

[20] The record reveals a less than congenial working relationship between the parties' counsel, particularly on this issue. The parties are urged to act professionally and courteously in this and all legal matters.

[21] *State v. Rios*, 19 Kan. App. 2d 350, Syl ¶ 1, 869 P.2d 755 (1994).

[22] K.S.A. 44-534a.

as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[23]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Thomas Klein dated May 11, 2007, is affirmed in part, reversed in part and those portions of the Order for which there is no jurisdiction are dismissed.

IT IS SO ORDERED.

Dated this _____ day of August, 2007.

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BOARD MEMBER

c: John L. Carmichael, Attorney for Claimant
D'Ambra Howard, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[23] K.S.A. 2006 Supp. 44-555c(k).